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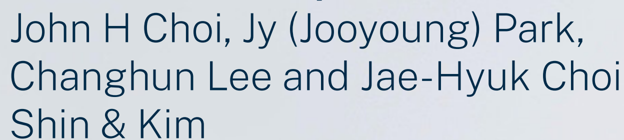

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Shin & Kim

# SOUTH KOREA

## Law and Practice

**Contributed by:**
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**Shin & Kim** has the largest team of antitrust specialists in Korea, with more than 70 dedicated experts, including a former Korea Fair Trade Commission (KFTC) chairman, officers and committee members, and former prosecutors and judges. The group is complemented by the largest number of KFTC alumni lawyers of any law firm, all of whom have extensive expertise in antitrust law and deep familiarity with KFTC enforcement practice. The firm has also gained a strong reputation for defending clients in KFTC investigations, including on-site investigations and hearings, and for representing clients in administrative appeals and relevant damages lawsuits. The group has represented numerous foreign clients in KFTC investigations and litigation.

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# 1. Basic Legal Framework

## 1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

In Korea, the statutory basis for challenging cartel behaviour/effects is the Monopoly Regulation and Fair Trade Act (MRFTA). Although there are other statutes that regulate cartels, including the Criminal Act and the Framework Act on the Construction Industry, most cartels are regulated under the MRFTA, through Article 40 to Article 44, and the Enforcement Decree of the MRFTA details or supplements the MRFTA provisions. In addition, as the enforcement authority of the MRFTA, the Korea Fair Trade Commission (KFTC) provides the following guidelines for cartels:

- Guidelines for Filing Applications for the Approval of Cartels and Competition-Restrictive Practices;
- Guidelines for Cartel Review;
- Guidelines on Examination of Cartels in Bidding;
- KFTC Notice on the Operations of the Leniency Guidelines for Voluntary Disclosure of Unfair Collusive Acts;
- Guidelines for Examination of Cartels Involving Administrative Guidance; and
- Guidelines for Review of Cartels Involving Information Exchange Between Business Entities.

On 10 December 2020, the prosecutors' office introduced "Guidelines for the Reduction of Penalty in Cartel Cases and Investigation Procedures", formally implementing a criminal leniency programme for cartel cases.

In addition, the fully amended MRFTA, effective as of 30 December 2021 (the "Amendment"), contains a number of changes regarding cartels, as discussed below.

## 1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

The KFTC may impose remedial orders and a surcharge on a company that has taken part in a cartel in violation of the MRFTA, and may file a referral to the prosecutors' office. According to the Amendment, the KFTC may impose a surcharge of up to 20% of the relevant revenue for cartels and raised the maximum amount of fixed

surcharge to KRW4 billion, which is twice the amount in the previous MRFTA.

However, for conduct that ended before the effective date of the Amendment (30 December 2021), the increased maximum surcharge does not apply, and the previous provision applies.

The MRFTA also has a provision on criminal punishment for cartels. A person who has engaged in a cartel may be subject to imprisonment for up to three years or a fine of up to KRW200 million, and a company that has engaged in a cartel may also be subject to a fine. If the company is a corporation, its representative and employees may also be subject to criminal punishment.

### 1.3 Private Challenges of Cartel Behaviour/Effects

A person who has suffered damages due to a cartel may file a damages lawsuit against the cartel participant. In such a case, standing for plaintiffs in the damages lawsuit is not necessarily limited to the cartel participant's competitor or direct transaction counterparty. Meanwhile, although a private person may report a cartel to the KFTC in order to urge the KFTC to investigate, a private person cannot directly file a lawsuit seeking to impose remedial orders or a surcharge on a cartel participant.

The limit in a damages lawsuit for a cartel was previously actual damages, but this has been changed with the adoption of punitive damages. The punitive damages provision regarding cartels applies to violations that occur for the first time from September 2019. Accordingly, a cartel participant is liable for damages not exceeding three times the actual damages to the injured party.

The court, when deciding the amount of damages not exceeding three times the actual damages, considers the cartel participant's intention, the degree of harm, the economic benefit gained by the cartel participant, a fine and surcharge for the violation, the duration and number of violations, the cartel participant's financial situation, the degree of effort made to provide relief for harm, etc. However, if a cartel participant has filed for leniency and been granted leniency status, the cartel participant is liable only within the scope of actual damages.

### 1.4 Definition of "Cartel Conduct"

Regarding cartels, the MRFTA provides that a company shall neither agree with any other company to jointly perform the following acts that unfairly restrict competition nor require any other company to engage in such illegal cartel conduct under contract, agreement or arrangement, or in any other manner:

- price fixing;
- determining terms and conditions for transactions;
- output restrictions;
- imposing limitations on the area in which transactions can be conducted, or transaction partners;
- hindering installation of facilities;
- imposing limitations on the kinds of, and standards for, goods or services to be produced or traded;
- jointly conducting and managing substantial business activities;
- bid rigging; and
- any other conduct that substantially restricts competition in certain areas of transaction by interfering with or imposing limitations on the business activities or the business of any other company, or by exchanging price,

production volume and other information prescribed by presidential decree.

### New Regulations Under the Amendment

Unlike the previous MRFTA, the Amendment includes information exchange as a type of cartel and prohibits an agreement if such agreement to exchange information between companies restricts competition. The conduct of substantially restricting competition in certain areas of transaction by exchanging price, production volume and other information prescribed by presidential decree was added as a type of cartel. Other information prescribed by presidential decree of the MRFTA includes the following information on goods or services:

- the cost of goods or services;
- delivery, inventory, or sales volume; or
- the transaction terms, price, or payment terms.

Previously, Korean courts determined that information exchange itself was not a cartel, but information exchange was added as a type of cartel under the Amendment. However, the Amendment's provision that regards information exchange as a type of cartel does not apply to conduct that has been terminated before the effective date of the Amendment (30 December 2021).

### The Guidelines for Review of Cartels Involving Information Exchange Between Business Entities

As the Amendment came into effect, the Guidelines for Review of Cartels Involving Information Exchange Between Business Entities (the "Guidelines for Review of Information Exchange Cartel") were enacted. According to the guidelines, "exchange of information" is defined as an act of disclosing competitively sensitive information on price, production volume, production cost, etc, to any other company. The means of disclosing information can be by mail, email, phone, or meeting, and also include indirect disclosure through intermediaries such as trade associations or a third-party company. On the other hand, publicly disclosing or publishing the aforementioned information to random parties is not considered to be an exchange of information. According to the Guidelines, for an exchange of information to be unlawful:

- there must be an agreement on the exchange of information;
- competition in the relevant market must be unreasonably restricted as a result; and
- there must be no efficiency-enhancing effect to offset the anti-competitive effects.

Meanwhile, the Amendment provides that an agreement among companies on cartel conduct is presumed if there is evidence of exchange of information between companies necessary for cartel conduct. According to the Guidelines for Review of Information Exchange Cartel, if (i) there is an external conformity, and (ii) information necessary to create external conformity was exchanged, an agreement on price fixing, output restriction, etc, is presumed by law if there is evidence of such exchange of information.

### Exception in the KFTC's Guidelines for Cartel Review

Joint conduct between competitors that is not anti-competitive is not prohibited. In this regard, according to the KFTC's Guidelines for Cartel Review, if the combined market share of the companies that participated in the cartel does not exceed 20%, the KFTC will end its review based on the view that an anti-competitive effect will not arise due to the joint conduct or that the anti-competitive effect is minimal. In addi-

tion, a cartel is exceptionally permitted if it has been approved by the KFTC on the grounds that its purpose is for industrial restructuring to help overcome recession, develop research and technology, improve trade term rationalisation, and improve the competitiveness of small and medium-sized businesses.

## 1.5 Limitation Periods

The KFTC may not impose remedial orders or a surcharge on a cartel if the following limitation period has elapsed:

- if the KFTC has commenced an investigation into an MRFTA violation – five years from the investigation commencement date; or
- if the KFTC has not commenced an investigation into an MRFTA violation – seven years from the date of termination of the violation.

Even if seven years have elapsed since the date of the cartel participants' agreement, the KFTC may impose sanctions if the cartel is still in progress. However, if a sanction has been cancelled according to a court's decision and a new sanction has been imposed according to a court's decision, the provision on the limitation period above does not apply. If an applicant filed for leniency by specifying the details of the cartel and the KFTC conducted an on-site investigation afterwards, the date the KFTC commenced its investigation is not the date of the on-site investigation but the date of the leniency filing.

Regarding an MRFTA violation other than a cartel, the statute of limitations for the KFTC to impose remedial orders or surcharge is seven years from the end date of the alleged violation. Unlike in the case of cartels, the statute of limitations does not differ based on whether the KFTC has commenced its investigation.

## 1.6 Extent of Jurisdiction

Cartels outside Korea may also be regulated by the KFTC under the MRFTA if they affect the Korean market. In this regard, in an appeal of an air cargo case, the Korean Supreme Court held that the MRFTA's scope of application for overseas conduct should be limited to overseas conduct that has a direct, substantial and reasonably foreseeable effect on the domestic market.

Meanwhile, the Korean Supreme Court has determined that if the Korean market is included in the subject of an anti-competitive agreement among foreign companies, then it should be considered to affect the Korean market, unless there are special circumstances.

## 1.7 Principles of Comity

The Korean court has emphasised the importance of comity with respect to competition law. In the air cargo case mentioned in **1.6 Extent of Jurisdiction**, the Korean Supreme Court expressed its concern that "excessive extraterritorial application of the MRFTA would give rise to unfair consequences".

Likewise, the KFTC has emphasised comity in areas involving competition law. It submitted an amicus brief on 23 May 2014 in Motorola Mobility LLC v AU Optronics Corp, No 14-8003 (7th Circuit 2014), where extraterritorial application of the US antitrust laws was a key issue. In this amicus brief, the KFTC asked the US court to uphold the comity principle by stating: "Furthermore, the antitrust regime of a country typically accommodates the country's unique legal tradition and socioeconomic characteristics... If this Court disregards such fundamental differences and applies the US antitrust laws to claims arising out of transactions that took place outside the US between non-US entities without any direct effect on the US market, such expansive

application of the US antitrust laws is likely to create conflicts with other countries' sovereignty."

### 1.8 COVID-19

To comply with social distancing due to COVID-19, the KFTC refrained from conducting on-site investigations at the height of the pandemic, except in cases where it was unavoidable. According to a press release from the KFTC, in 2020, the number of cases filed decreased by 28% and the number of cases handled decreased by 16% compared to 2019, which the KFTC attributed to the fact that conducting face-to-face investigations was made challenging due to COVID-19. However, starting from 2023, with the decline of the pandemic, the KFTC has resumed conducting on-site investigations in various areas.

### 1.9 Changes in the Regulatory Environment Affecting Competition Regulation

President Yoon Suk-yeol took office in May 2022 and KFTC Chairperson Han Ki-Jeong took office in September 2022. The Yoon Suk-yeol administration has expressed its commitment to promoting free market competition while strictly sanctioning market violations that undermine fair competition principles, so as to maximise creativity in the corporate and private sectors. In January 2023, the KFTC announced its goals for the year, which included promoting a market environment that fosters innovation competition, with specific mention of cartel-related issues. The KFTC plans to focus on investigating cartels in the areas of consumer goods (energy, household goods, communication equipment, apartment maintenance and repair, etc), intermediate goods (construction-related raw materials, industrial parts, materials, equipment, etc), and service platform sectors.

## 2. Procedural Framework for Cartel Enforcement – Initial Steps

### 2.1 Initial Investigatory Steps

The KFTC may commence an investigation into an alleged cartel case on its own or by receiving a report of such cartel. According to the annual statistical report issued by the KFTC, of the KFTC's 138 cartel cases in 2021, 94 were based on reports to the KFTC and 44 cases were commenced by the KFTC on its own.

### 2.2 Dawn Raids

The KFTC may conduct a dawn raid to investigate whether there has been a violation of the MRFTA by sending investigating officials to the place of business of the company that is suspected of participating in a cartel. In fact, the KFTC frequently conducts dawn raids. The KFTC's dawn raid is conducted with the consent of the company that is subject to the investigation (ie, it is not a compulsory investigation). However, if the company, an officer or an employee interferes with the KFTC's investigation, criminal punishment may be imposed, depending on the type of interference. Meanwhile, the investigating official and such official's supervisor who receive a report of the investigation plan have an obligation to keep information related to the dawn raid confidential so that it is not leaked. The KFTC revised its case procedure rules and investigative procedure rules to enhance the procedural rights of investigated companies in relation to dawn raids, and these revisions have been in effect since 14 April 2023.

#### Procedure of Dawn Raids

*Investigating physical evidence*

Before investigating the desks, drawers, cabinets or work notebooks, among other items, of the investigated company, the investigating official should seek co-operation from the per-

son in charge of the division that is subject to the investigation at the investigated company or an officer or employee of equivalent position. If there is concern regarding the destruction of evidence, the investigating official may keep such materials or objects in custody after explaining the necessity of doing so, preparing a record of custody, and issuing such record to the employee of the investigated company.

*Investigating data*

When investigating data in the information processing system of the investigated company, the data should be accessed or copied with the co-operation or in the presence of the person concerned at the investigated company. At this time, the investigating official may collect digital data by deciding the scope of the data and printing it or using the imaging method at the investigation site. However, if it is difficult to decide the scope of the data and to image it at the investigation site, the digital storage media can be held in custody or the entire digital data may be imaged, in which case, data is selected later at the KFTC office with the investigated company's counsel in attendance. If an officer or employee of the investigated company requests a copy of the data collected by the investigating official, the investigating official must comply with the request. The investigated company may request a copy of the imaging file collected by the KFTC, and the investigating official must comply with the request, unless there is a justifiable reason not to do so. If it is recognised that the materials or articles subject to custody are not related to the investigation or that they do not need to be retained for the purpose of the investigation, they must be returned immediately.

*Return or disposal of materials*

Meanwhile, the KFTC has implemented a new procedure allowing investigated companies to request the return or disposal of irrelevant materials submitted during dawn raids. Investigated companies may request the return or disposal of irrelevant materials within seven days of submission. Investigating officials must return or dispose of the materials if they are deemed irrelevant, or they must request a separate determination by a committee within the KFTC if they believe the materials are relevant to the investigation. If the committee determines that the materials are irrelevant to the investigation, they must be returned or disposed of accordingly.

*Interviewing persons of interest*

In the dawn raid process, the investigating official may conduct interviews of parties, interested persons, or persons for reference and may request statements or confirmation documents. However, if there are inevitable circumstances that make it difficult for the officer or employee to comply with such a request, then the interviews will be carried out later, after discussing the schedule and place of the investigation.

If an officer or employee of the investigated company requests a copy of the statement or confirmation document prepared with regard to themselves, then the investigating official must comply with the request, unless there is considerable concern about interference with the investigation, such as the destruction of evidence or the leaking of confidential investigation information. Meanwhile, if an officer or employee refuses to co-operate with an interview, an administrative fine of up to KRW100 million for the investigated company and up to KRW10 million for the officer or employee may be imposed.

### Restrictions on Dawn Raids

*Notice of investigation*

When conducting a dawn raid, the investigating official must first present a public official identi-

fication card and issue a notice of investigation to the officer or employee of the investigated company, stating the period, purpose, subject and method of the investigation. Meanwhile, in order to alleviate uncertainty regarding the scope of investigations, the KFTC has revised and implemented the investigative procedure rules to include the period of investigation and the specific types of transactions or conduct subject to investigation in the notice of investigation. The investigating official must conduct the dawn raid within the scope of the purpose of the investigation stated in the notice of investigation. However, if materials are found during the investigation process that show there is a possibility of a law violation that is outside the scope of the purpose of the present investigation but that falls under the KFTC's jurisdiction, appropriate measures should be taken by the KFTC, such as sending the relevant materials to the KFTC division in charge.

The dawn raid must be conducted only within the place of business stated in the notice of investigation. However, if the place of business stated in the notice of investigation is not a place of business that meets the purpose of the investigation, or if there is a suspicion of a law violation that is consistent with the purpose of the investigation at another place of business during the investigation process, an investigation may be conducted after issuing a separate notice of investigation that specifies such place of business. Meanwhile, to eliminate the practice of prioritising the investigation of a company's legal team or compliance department during dawn raids, the updated rules of investigative procedure now prohibit targeting these departments in principle, unless these departments are directly involved in illegal activities or destruction of evidence.

*Time and duration of investigation*

The investigating official must conduct the investigation within the regular working hours of the investigated company. If it is impossible to achieve the purpose of the investigation by investigating within regular working hours due to concern about destruction of evidence, etc, the investigation may even be conducted outside regular working hours after the necessity of the extension is sufficiently explained to a person in charge at the investigated company, and after discussion with such person in charge.

The investigating official must complete the investigation within the investigation period stated in the notice of investigation. However, if the purpose of the investigation could not be achieved within the investigation period, said period may be extended to the extent that the burden of the investigated company can be minimised. If the investigation period is extended, the investigating official must provide an additional notice indicating the extended period and the reasons for the extension.

## 2.3 Spoliation of Information

If a company, an officer or an employee interferes with the KFTC's investigation by means such as hiding or destroying materials or objects requested by the KFTC, refusing access or forging or falsifying materials, the KFTC may file a referral to the prosecutors' office regarding the company, officer or employee who interfered with the investigation. If the prosecutors' office indicts in connection with this, the court may impose imprisonment for up to two years on the relevant employee, or a fine of up to KRW150 million on the company or relevant employee.

## 2.4 Role of Counsel

In principle, if there is a request by the investigated company, the investigating official must allow

counsel (including in-house counsel) appointed by the investigated company to participate in the entire investigation process (including the process of the KFTC taking statements and confirmation documents). In addition, the investigating official must take receipt of a power of attorney clearly indicating the scope of the right of representation that has been delegated and the counsel, in order to confirm whether the counsel has been appointed as the legal representative of the company being investigated. However, if one of the following applies, then counsel may be prevented from participating:

- if the investigated company's request for counsel participation is deemed to delay or interfere with the commencement and proceeding of the investigation;
- if counsel intervenes in the interrogation without approval by the investigating official, or engages in offensive speech or conduct;
- if counsel responds on behalf of the investigated company or induces a specific answer or alteration of a given statement;
- if counsel films, tapes or records the content of the interrogation (excluding taking simple notes to help jog their memory for the purpose of providing legal advice); and
- if this clearly makes it difficult to achieve the purpose of the investigation in any other way.

In addition, in relation to cartel investigations that require urgent investigation due to concerns such as the destruction of evidence, investigations may be commenced regardless of whether the request for counsel participation is granted.

### Requirement to Obtain Separate Counsel

Officers and employees of an investigated company that is subject to the KFTC's investigation do not need to appoint counsel other than the counsel appointed by the investigated company, unless there is a conflict of interest. Of course, officers or employees may appoint separate counsel based on their own judgement.

### Initial Steps Taken by Defence Counsel

At the initial phase of the investigation, defence counsel should focus on reducing the scope of the charge against the investigated company. For example, it may be necessary to identify and analyse issues about which the KFTC might be suspicious in the statements made by an investigated company or in the contents of the materials in custody, establish defence logic against them, and actively explain them to the KFTC from the initial phase of the investigation. Defence counsel may request the exclusion from the submission of materials that are unrelated to the subject of the investigation through discussion with the KFTC.

It should be noted that, from the initial phase of the investigation, the KFTC should not be given the unnecessary impression that the investigated company is being unco-operative with the investigation. Even if the investigated company does not accept the charge, giving the impression of fully co-operating with basic requests from the KFTC can facilitate smooth communication with the KFTC in the future, and this can bring about a more positive result.

## 2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

When necessary for the investigation, the KFTC's investigating official may obtain statements from the investigated company, interested persons and reference persons, and may order the submission of necessary materials and hold them in custody. Although the KFTC's investigation procedure is based on the consent of the investigated company, the MRFTA does have certain measures in place for enforcement. For exam-

ple, in the case of failure to attend an interview without justifiable cause, an administrative fine of up to KRW100 million for companies and up to KRW10 million for employees or interested persons may be imposed.

In addition, those who refuse to submit materials without justifiable cause may be subject to an enforcement fine not exceeding 3/1,000 of the average daily sales revenue for each day of delay.

As explained above, the KFTC may access or copy materials in the information processing system with the co-operation or in the presence of the person concerned. At this time, the investigating official can decide the scope of the digital data and collect it by printing it or using the imaging method. Depending on the circumstances, digital storage media can be held in custody, or all the digital data can be imaged, in which case the data will be selected later at the KFTC office in the presence of the investigated company's counsel.

## 2.6 Obligation to Produce Documents/Evidence Located in Other Jurisdictions

The KFTC may conduct investigations into documents and evidence located in other jurisdictions with the consent of the investigated company. For example, if the materials are available to the investigated company, submission of these materials may be requested even if they are located in a foreign country or stored on a foreign server, including the cloud. Statements from officers and employees of an investigated company located abroad may also be requested. However, the Korean prosecutors' office may not conduct search and seizure by force with respect to materials or objects located in the jurisdiction of another country.

## 2.7 Attorney-Client Privilege

Korean law does not recognise the principle of attorney-client privilege.

The privilege against self-incrimination is not recognised in the KFTC investigation process. However, if the prosecutor indicts with respect to the cartel conduct and a criminal proceeding is commenced, the privilege is recognised.

## 2.8 Non-cooperation With Enforcement Agencies

It is common for the investigated company to co-operate with the KFTC's investigation, to the extent possible, taking into account both the legal and practical aspects. As mentioned earlier, in the event of interference with the KFTC's investigation, there is a possibility of criminal punishment, and in the event of failure to attend an interview or failure to comply with an order to submit materials, an administrative fine or enforcement fine may be imposed.

In addition, any surcharge imposed for the cartel may be reduced according to the degree of co-operation with the investigation. From a practical aspect, giving the KFTC the impression of co-operating fully with the investigation will help to bring about a positive result through smooth communication with the KFTC.

## 2.9 Protection of Confidential/Proprietary Information

The investigated company cannot refuse to submit materials requested by the KFTC solely on grounds that such materials are confidential or proprietary information. Rather, it is the obligation of the KFTC officials to keep information they have discovered about a company as a result of their investigation confidential, and not use such information for purposes other than enforcement of the MRFTA.

If materials requested by the KFTC include information protected by the Personal Information Protection Act, such as employees' registration numbers and addresses, the investigated company may submit materials after excluding the parts containing such personal information.

## 2.10 Procedure for Defence Counsel to Raise Arguments Against Enforcement

There is no separate provision on procedure for defence counsel to defend the investigated company in response to a KFTC investigation. In the course of the KFTC's investigation and review, defence counsel may present opinions regarding the facts and legal interpretation to the KFTC in the form of a statement or written submission, in order to defend the investigated company and persuade the KFTC not to take action against it.

## 2.11 Leniency and/or Immunity Regime

The MRFTA provides for a leniency programme. As a result, the KFTC may exempt a company or grant a reduction in remedial orders and surcharge to companies that have filed a leniency application for a cartel. The KFTC may also exempt the leniency applicant from referral to the prosecutors' office.

According to the antitrust and competition white paper issued by the KFTC in 2022, the leniency programme was used in 56.9% of the cartel cases in which a surcharge was imposed from 1999 to 2021; from 2005 to 2021, in particular, this rose to 62.3%.

Meanwhile, a new criminal leniency programme was introduced by the prosecutors' office on 10 December 2020. In this article, the term "KFTC leniency programme" is used to refer to the leniency programme under the MRFTA that is administered by the KFTC, and the term "criminal leniency programme" to refer to the leniency programme led by the prosecutors' office.

### KFTC Leniency Programme

*Applied standards for leniency*

To obtain first-priority leniency status, an applicant must satisfy all the following requirements:

(a) the applicant must be the first person to exclusively provide the evidence necessary to prove the existence of collusion;
(b) at the time of the leniency filing, the KFTC must not have obtained information about the collusion, or not enough evidence to prove the existence of collusion;
(c) the applicant must co-operate in good faith until the end of the KFTC review process by stating all the facts related to the collusion and submitting related information;
(d) the applicant must stop its participation in the collusion; and
(e) the applicant must not have coerced another enterprise to participate in collusion, nor have repeatedly committed collusion over a certain period in violation of the MRFTA.

The KFTC is required to give the applicant with the first-priority leniency status full immunity from the surcharge payment and remedial measures while it is not required, but may decide at its discretion to give full immunity from criminal referral.

To obtain second-priority leniency status, an applicant must satisfy conditions (c), (d) and (e) above, and the applicant must be the second person to exclusively provide the evidence necessary to prove the existence of collusion, provided that the leniency application is filed within two years of the date of the first applicant's leniency filing. If only two companies participated in the cartel, it is not possible for a company

to obtain second-priority leniency status. The KFTC is required to give the applicant with the second-priority leniency status a 50% reduction of the surcharge payment while it is not required, but may decide to give full immunity from remedial measures and immunity from criminal referral. In practice, the KFTC provides full immunity from criminal referral as well.

*Leniency application process*

In principle, a leniency application must be in writing, and it may be submitted by visiting the KFTC, or via email or fax. A leniency application must include an overview of the collusion at issue at the time of filing. The application may be supplemented to meet the legal requirements within a certain period.

At this time, if material is submitted regarding a collusion that is separate from the collusion in the leniency application, the submission is not regarded as supplementation, but as a new leniency application for the separate collusion.

As a rule, the application supplement period cannot exceed 15 days, but an additional 60-day period may be granted at the KFTC case handler's discretion. Where necessary, the case handler may even grant more than 60 days for the additional period. However, a leniency application filed by one company can only be supplemented to a joint leniency application within the first 75-day period.

*Recognition of leniency status*

Priority for a leniency applicant is determined by the time of receipt of the leniency application. However, if an officer or employee of the leniency applicant provided the necessary evidence to prove the existence of the cartel in the form of a confirmation document or statement prior to the leniency application, then the leniency application is deemed to have been submitted at the time of submission of such evidence.

The KFTC case team eventually issues an examiner's report as to whether the applicant has satisfied all the requirements to be granted leniency status, and submits the report to the commission. In the KFTC's review process, it generally holds a hearing which is, in practice, separate from the hearing of the main collusion case. The KFTC typically holds a (closed) hearing for the leniency application review and a hearing for the main collusion case on the same day. Once the hearing for the leniency application review is concluded, the KFTC renders a decision on leniency status.

*Withdrawal of leniency status*

According to the Amendment, where the KFTC has granted leniency status to an applicant and has reduced or exempted remedial orders or surcharge on the applicant, if the applicant is found to have provided statements in a trial for such cartel that are different from those provided during the investigation process, or otherwise engages in conduct prescribed by the Enforcement Decree of the MRFTA, the KFTC may withdraw reduction or exemption from remedial orders or surcharge in the following cases defined by the Enforcement Decree of the MRFTA:

- the applicant denies all or part of the statement they provided or material aspects of documents submitted in the course of the KFTC's investigation;
- the statement provided or documents submitted by the applicant in the course of the KFTC's investigation are found to be false in the trial;

- the applicant fails to state the facts of cartel conduct in the trial without justifiable grounds;
- the applicant fails to appear in court without justifiable grounds; or
- the applicant files a lawsuit to deny the cartel conduct for which it filed a leniency application.

**Criminal Leniency Programme**

On 10 December 2020, the prosecutors' office implemented a criminal leniency programme for cartel cases by introducing the Guidelines for the Reduction of Penalty in Cartel Cases and Investigation Procedures (the "Criminal Leniency Guidelines"). For cartel cases, the MRFTA gives the KFTC the exclusive right to make a criminal referral, and the prosecutors' office can proceed with an indictment only where there was a criminal referral from the KFTC. However, the Criminal Leniency Guidelines allow the prosecutors' office to commence investigation of hard-core cartels directly reported to or detected by the prosecutors' office, even without the KFTC's referral.

In terms of the structure of the leniency programme, eligibility and conditions for criminal leniency applications are similar to those for the KFTC leniency programme, that is, first to provide evidence, the duty to co-operate (including a duty to maintain confidentiality), and the duty to cease cartel activities.

However, there are several differences. Unlike the KFTC leniency programme that applies to cartels including soft-core cartels, the criminal leniency programme applies only to hard-core cartels (eg, those engaged in price fixing, output restrictions, market allocation, etc) under the MRFTA, together with certain bid-rigging conduct.

Also, under the criminal leniency programme, the first leniency applicant is eligible for exemption from an indictment, whereas the second-ranked leniency applicant is not guaranteed exemption or reduction of criminal penalty. For the second-ranked leniency applicant, the prosecutors' office will recommend a 50% less severe penalty, but the court has discretion as to the actual penalty imposed on the second-ranked leniency applicant. Furthermore, the Criminal Leniency Guidelines provide that in principle, leniency applicants will not be subject to search and seizure, arrest, detention, or other compulsory investigation, except in special circumstances.

Moreover, an individual executive/employee (including those who are no longer with the company) can independently file for criminal leniency, in which case, the individual will compete with companies in terms of leniency ranking. The prosecutors' office will determine the leniency ranking independently of the KFTC leniency ranking.

There still remain uncertainties – in terms of how the KFTC leniency programme and criminal leniency programme will overlap. For instance, it is unclear how a case should be handled if different companies file leniency applications with the KFTC and the prosecutors' office for the same conduct in a different order. It is therefore important to consider whether it is wise to apply for criminal leniency with the prosecutors' office while simultaneously applying for leniency with the KFTC.

## 2.12 Amnesty Regime

If a party that is subject to sanctions due to cartel conduct (Conduct A) obtains first-priority leniency status for their conduct in another cartel (Conduct B), the KFTC may reduce or exempt

the surcharge and reduce the remedial orders for Conduct A. The party must file the leniency application for Conduct B after the investigation commencement date or leniency application date for Conduct A – whichever is earlier – and before the KFTC deliberation date for Conduct A.

## 3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds

### 3.1 Obtaining Information Directly From Employees

The KFTC can directly acquire information by investigating the officers and employees of the investigated company. See **2.5 Enforcement Agency's Procedure for Obtaining Evidence/ Testimony**.

### 3.2 Obtaining Documentary Information From the Target Company

The KFTC can seek documentary information directly from the investigated company. See **2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**.

### 3.3 Obtaining Information From Entities Located Outside This Jurisdiction

The KFTC can seek information directly from companies or individuals located outside the jurisdiction by issuing requests for information. In this case, the KFTC will usually require the relevant entity to designate a representative in Korea to receive the request for information, and then send the request for information to such representative. However, if the entity does not designate a representative in Korea, then the KFTC will use a method in accordance with the Administrative Procedure Act, such as delivery by post.

### 3.4 Inter-agency Co-operation/Co-ordination

When deemed necessary for enforcement of the MRFTA, the KFTC may ask the head of a relevant administrative agency or other institution or organisation to conduct the necessary investigation or to share the necessary information. In practice, however, this is not common.

### 3.5 Co-operation With Foreign Enforcement Agencies

The KFTC actively co-operates with foreign enforcement agencies in the investigation of international cartel cases. Of course, the degree of co-operation may vary from case to case, but the KFTC communicates with foreign enforcement agencies through various channels.

### 3.6 Procedure for Issuing Complaints/ Indictments in Criminal Cases

As mentioned in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**, the MRFTA has a provision on criminal punishment for cartels, which happens through indictment by the prosecutors' office. In principle, the prosecutors' office can indict for violations of the MRFTA, including cartels, only when the KFTC files a referral to the prosecutors' office. However, according to the MRFTA, if the degree of the violation is objectively clear and serious so that it clearly hinders competition, the KFTC must file a referral to the prosecutors' office. In this case, the prosecutor general may even ask the KFTC to file the referral to the prosecutors' office, which the KFTC chairman is obliged to do.

In addition, even if the KFTC has determined that the requirements for filing the referral have not been met, the chairman of the Board of Audit and Inspection, the minister of the Ministry of SMEs and Startups, and the administrator of the Public

Procurement Service may request that the KFTC files the referral to the prosecutors' office based on social impact, the effect on national finance, and harm to small and medium-sized businesses. In such a case, the KFTC chairman must also file the referral to the prosecutors' office.

If the prosecutors' office indicts pursuant to the KFTC's referral, a criminal trial will proceed in court. A defendant in a criminal case involving a cartel is guaranteed the right to counsel, as in criminal cases in general. If the prosecutor submits materials from the KFTC as evidence, the defendant may access and copy such evidence. In addition, the defendant may attempt to obtain materials in the KFTC's possession that the prosecutor has not submitted as evidence by means such as sending a fact enquiry or request for a document.

## 3.7 Procedure for Issuing Complaints/ Indictments in Civil Cases

### Procedure for Imposing Administrative Measures

Unlike the legislation of countries where the competition authority brings a civil action, as a regulatory authority, the KFTC may directly impose administrative sanctions such as remedial orders and surcharges on companies that violate the MRFTA by participating in cartels. The KFTC handles a case through examination, deliberation and decision.

The KFTC's "examination" refers to a series of investigation processes by the KFTC after it has received information about an MRFTA violation, until it determines the need for deliberation and a decision in respect of the case. Parties, interested persons and witnesses may submit opinions or make statements at the investigation stage.

If the KFTC examiner determines that an MRFTA violation is established after the examination and submits an examiner's report to the KFTC (composed of nine members, including the chairman and vice chairman), the "deliberation" process commences. The KFTC may conduct an investigation of evidence ex officio or at a party's request if necessary, after the deliberation process has commenced. The MRFTA in principle prohibits public officials in charge of investigation from conducting on-site investigations or listening to statements from parties when the deliberation process has commenced after introduction of the examiner's report. However, this is allowed as an exception when deemed necessary by the plenary session or subcommittee meeting. Under the Amended Rules of Investigative Procedure, to ensure that parties have ample opportunity to express their opinions, the KFTC must hold hearings for two or more days upon request if a company is a party and has five or more participants (or 15 or more in the case of a cartel case), or if the estimated maximum amount of the fine is at least KRW100 billion (at least KRW500 billion in a cartel case).

The Commission will listen to the opinions of the parties and interested persons, examine the evidence, deliberate whether there has been a violation of law, and impose measures through a "decision". Regardless of whether the KFTC imposes or does not impose measures after investigation, the MRFTA requires the KFTC to give written notice to the parties of the details, bases and reasons for such.

Meanwhile, after a respondent is provided with the examiner's report above and the attached materials, the respondent not only has the opportunity to submit opinions and explanatory materials but also to attend the hearing and give testimony.

### Access to Material

According to the MRFTA, a party or an applicant who has filed a claim for damages alleging violation of the MRFTA can request the KFTC for access to and a chance to copy material related to the KFTC's decision under the MRFTA, except for trade secrets, leniency material and confidential material according to other laws.

Meanwhile, under the Guidelines for Access and Copying of Materials, the respondent may request to access and copy materials not disclosed in an examiner's report. The KFTC must allow access and copying, except for trade secrets, leniency material and confidential material according to other laws. In the case of trade secrets or leniency materials, access or copying is, however, permitted with the consent of the submitter. In addition, in the case of material containing trade secrets, the respondent can access the material through a restricted method (the data room system discussed below) pursuant to the decision of the KFTC, even without the consent of the submitter.

#### *The data room system*

The KFTC introduced the data room system when establishing the relevant guidelines above. A person granted access by the KFTC is limited to the respondent's external lawyer. The lawyer can access confidential information (trade secrets) by entering the data room located in the KFTC's office. A person granted such access views the material through a PC that is blocked from communicating with the outside. A person granted access by the KFTC can verify the existence and content of the evidence, the relevance between the evidence and the conduct, and the accuracy of the quantitative analysis by the examiner, and the person may prepare a brief containing such results. The lawyer who used the data room is prohibited from expressly writing down the confidential information.

The brief prepared by the lawyer in the process of using the data room must be approved by the commissioner in charge. After the brief has been approved by the commissioner, the KFTC will send the brief to the respondent. The respondent's external lawyer who used the data room may not disclose the confidential information to anyone, including the respondent. In addition, the respondent cannot be provided with or demand the provision of trade secrets from the lawyer who accessed the material.

## 3.8 Enforcement Against Multiple Parties

In general, the KFTC deliberates and makes a decision concurrently with respect to all the companies involved in a cartel. However, as explained above, the Commission's review for recognition of leniency status usually takes place at a separate closed hearing.

When the prosecutors' office indicts, it is common for the indictment to be with respect to all the companies that participated in the cartel, as co-defendants. In the absence of special circumstances, the criminal case against the co-defendants will proceed in a single proceeding.

## 3.9 Burden of Proof

The KFTC bears the burden of proof for all the elements for establishing a cartel, such as the existence of an agreement prohibited by the MRFTA and an anti-competitive effect. However, if there is external conformity of business entities' conduct (ie, two or more business entities engage in conduct falling under a type of cartel), and there is considerable probability that the business entities acted jointly, an agreement is presumed by law. If an agreement is presumed by law, the KFTC only needs to prove anti-com-

petitive effect, and the business entity must prove the absence of an agreement.

Meanwhile, the Amendment added a provision that if there is external conformity of business entities' conduct and the information necessary for such conduct is exchanged, an agreement is presumed by law. In other words, even if there is no circumstantial fact that shows joint conduct, an agreement is presumed by law in the case of external conformity and the exchange of information.

According to the Guidelines for Review of Information Exchange Cartel, (i) external conformity can be deemed to exist where the rate, range and timing of price changes are the same or similar, and external conformity can be deemed to exist even if there is a difference in the range of price changes, etc, if such difference is too small to affect consumer choice; and (ii) if exchange of information that is highly likely to restrict competition took place, such as price and production volume, the exchange of information necessary to create external conformity may be deemed to have taken place, and if the exchange of information took place shortly before decision-making, it is highly likely that necessary information was exchanged. If an agreement is presumed, the business entity can rebut the presumption by proving that external conformity does not exist, or that even if external conformity exists, it does not result from an agreement among competitors. However, the rules for presuming an agreement for information exchange apply only to conduct that is terminated after the effective date of the Amendment (30 December 2021).

In a criminal proceeding for a cartel, the prosecutor has the burden of proving that the cartel constitutes a crime.

### 3.10 Finders of Fact

The KFTC is the finder of facts in the KFTC deliberation process, and it also interprets and applies the law based on facts that it has found.

### 3.11 Use of Evidence Obtained From One Proceeding in Other Proceedings

Evidence obtained in one proceeding can be used in other proceedings, and evidence from another jurisdiction may also be used. This is because there is no provision prohibiting their use. However, evidence offered by an applicant for leniency may be used only to handle the case for which the leniency application was filed.

### 3.12 Rules of Evidence

There are no special rules of evidence related to KFTC procedure. However, in a criminal proceeding for a cartel, the admissibility of evidence may be limited through application of the exclusionary rule for illegally obtained evidence, the rule of corroborating evidence for confessions, and the hearsay rule.

### 3.13 Role of Experts

During the KFTC's investigation and deliberation process, the KFTC examiner or the investigated company may receive help from experts. There are cases where expert opinions are submitted during the KFTC procedure, or where experts attend the KFTC hearing in person to present their opinions. However, expert involvement is not common for a cartel case in a KFTC proceeding. On the other hand, in a civil damages lawsuit for a cartel it is common for experts such as economists to be involved as appraisers in order to prove damages.

### 3.14 Recognition of Privileges

There is no special privilege that is recognised in the KFTC procedure. As explained above, attorney-client privilege is not recognised in Korea.

### 3.15 Possibility for Multiple Proceedings Involving the Same Facts

In cases where multiple cartel proceedings are at issue based on the same or related facts, the KFTC may, at its discretion, handle them separately or in a simultaneous process. In these cases, however, it is common for the KFTC to handle them through a simultaneous process.

## 4. Sanctions and Remedies in Government Cartel Enforcement

### 4.1 Imposition of Sanctions

The KFTC may impose remedial orders and a surcharge directly on a company involved in a cartel in violation of the MRFTA. See **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**.

### 4.2 Procedure for Plea Bargaining or Settlement

There is no plea bargaining or settlement system for a cartel case in Korea.

### 4.3 Collateral Effects of Establishing Liability/Responsibility

If the KFTC finds an illegal cartel and imposes sanctions, it tends to be easily recognised in court in a related damages lawsuit that there was illegal cartel conduct. Of course, the court is not bound by the KFTC's determination.

If the KFTC imposes sanctions for cartel conduct, it may ask an administrative agency to limit the eligibility of a company that participated in the cartel to participate in bidding processes. The head of the administrative agency that receives the KFTC's request may limit such company's eligibility to participate in bidding processes for a certain period of time.

### 4.4 Sanctions and Penalties Available in Criminal Proceedings

See **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards** and **3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases**. The type and amount of penalties imposed in a criminal proceeding on a company that participated in a cartel are determined by the court. The prosecutor asks the court to impose certain penalties. At this time, the KFTC does not present any opinions.

### 4.5 Sanctions and Penalties Available in Civil Proceedings

See **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards** and **3.7 Procedure for Issuing Complaints/Indictments in Civil Cases**.

### 4.6 Relevance of "Effective Compliance Programmes"

A company's effective compliance programme is not considered as a factor in imposing sanctions in a cartel case.

### 4.7 Mandatory Consumer Redress

The KFTC does not have the authority to require a company involved in a cartel to compensate those who have suffered damages due to the cartel. Such claimants may be compensated for damages through civil lawsuits. That is, there is no mandatory consumer redress system.

### 4.8 Available Forms of Judicial Review or Appeal

A company that has been sanctioned by the KFTC for participating in a cartel may file a lawsuit to cancel the KFTC's decision by submitting a complaint to the Seoul High Court against the KFTC within 30 days of the date of notification of the KFTC decision. The KFTC must submit an answer to the complaint submitted by the plain-

tiff. Once the answer is submitted, the court usually sets a hearing to organise the issues. When the court determines that the issues have been organised to a certain degree, the court will set a hearing for examination of the evidence, such as witness examination. Hearings are usually set one to two months apart. After the hearings, when the court determines that the facts have been settled to the extent that it can announce a decision, the court will end the hearings and schedule announcement of its decision. The parties may freely submit briefs and evidence without limit until hearings have ended, unless the court sets a limit.

Commencement of the cancellation lawsuit above does not mean that the KFTC's case record is transferred to the Seoul High Court. The KFTC must submit materials that were the bases for its decision as evidence at the litigation stage. At the litigation stage, the plaintiff may present new arguments and evidence that were not presented or submitted at the KFTC stage. A party that seeks to object to the Seoul High Court's decision may file an appeal to the Supreme Court within two weeks of receiving a written copy of the Seoul High Court's decision. Mostly, however, the Supreme Court makes a decision with respect to the law only and not the facts. According to the KFTC's annual statistical report, the KFTC's decision was challenged in court in 2021 in 26.8% of cases (including cases other than cartel cases).

## 5. Private Civil Litigation Involving Alleged Cartels

### 5.1 Private Right of Action

Private firms or individuals who have suffered damages due to a cartel may file a damages lawsuit against companies that participated in the cartel.

In this case, a plaintiff usually claims tort as the basis for the claim. In Korea, in order for a tort to be established, the plaintiff must prove the following:

- unlawful conduct based on the intent or negligence of the perpetrator;
- victim's damages; and
- causation between the unlawful conduct and the damages.

If it is found that there has been illegal cartel conduct, often the first element above will be seen as being met. The plaintiff may file a damages lawsuit against a company that participated in a cartel even before the KFTC makes a decision regarding a cartel. However, if a damages lawsuit is filed before the KFTC makes a decision, the plaintiff's burden of proof for establishing the existence of a cartel (the first element above) increases. Therefore, it is common for the plaintiff to file a damages lawsuit after the KFTC makes a decision, thereby reducing its burden of proof to establish the existence of a cartel. In this case, the main issues for the damages lawsuit are damages and causation; ie, the second and third elements above.

As for the punitive damages provision that has been in effect since September 2019, see **1.3 Private Challenges of Cartel Behaviour/Effects**.

In relation to the damages lawsuit above, the court with jurisdiction over the case is the court with jurisdiction over the defendant's principal office and the plaintiff's address. The court with jurisdiction over the place where the cartel conduct occurred also has jurisdiction over the case.

### 5.2 Collective Action

Cartel victims can file a damages lawsuit as co-plaintiffs. However, the so-called class action system does not apply to a damages lawsuit for cartel conduct. While a class action bill was prepared by the Korean government to be submitted to the National Assembly, the bill was ultimately not submitted.

### 5.3 Indirect Purchasers and "Passing-On" Defences

Korean courts have not expressly recognised the passing-on defence. However, by taking into account the portion of damages that were passed on when deciding the amount of damages, Korean courts in fact recognise the passing-on defence in part.

### 5.4 Admissibility of Evidence Obtained From Governmental Investigations/Proceedings

Evidence from government investigations or proceedings may be used as evidence in a damages lawsuit for cartels as well. The plaintiff in the damages lawsuit may try to obtain evidence held by the KFTC through means such as a request for documents.

Meanwhile, according to the Amendment, in a damages lawsuit filed for cartels, the court, at the request of a party, may order the other party to submit material needed to prove damages or calculate the amount of damages (leniency-related material is excluded). The party receiving this order cannot refuse to submit the material unless there is good cause. The MRFTA states that if the material is necessary for proof of damage or for calculating the amount of damages, even if it is a trade secret, good cause will not be found. If the party receiving the order does not comply with the order without good cause, the court may find that the other party's argument regarding the content in the material – ie, the other party's argument that the material contains certain details – is true.

In addition, if the party receiving the order does not comply with the order without good cause, and it is notably difficult for the party requesting the order to argue specifically regarding the content in the material, and if it is difficult to prove the fact to be proved through the material with other evidence, the court may find the other party's argument as to what the material contains is true.

The order to submit material under the MRFTA applies to damages claims filed after the effective date of the Amendment (30 December 2021).

### 5.5 Frequency of Completion of Litigation

If a damages lawsuit is filed in connection with cartel conduct, the dispute usually comes to an end through the court's decision. It is not common for a dispute to be resolved based on settlement in the middle of the damages lawsuit.

The time period until announcement of the first-instance court's decision in the damages lawsuit above is usually at least two years, although this may differ depending on the complexity of the case; some cases can take many years. The main reason for a prolonged time period is related to the damages assessment process and related administrative lawsuit process. During the lawsuit, a hearing will not be set for some time in order to wait for the result of assessment of the damages amount, which generally takes six months to one year.

In addition, if the damages lawsuit is filed while the Seoul High Court's administrative lawsuit is in progress, there is a possibility that the court

handling the damages lawsuit will not set a hearing for a prolonged period of time after proceeding with basic procedures in order to observe the result of the administration lawsuit. However, it is also possible for the court handling the damages lawsuit to proceed independently without waiting for the outcome of the administrative lawsuit.

## 5.6 Compensation of Legal Representatives

When announcing its decision, the court also announces the litigation cost burden (including attorneys' fees). In general, the losing party is ordered to bear the litigation costs. If only a part of the plaintiff's claims have been accepted by the court, it is common for the defendant to bear the costs according to the ratio of the plaintiff's claims that have been accepted, and for the plaintiff to bear the rest. However, the attorneys' fees included in the litigation costs above do not mean actual compensation paid to attorneys, but refer to the amount set by the Supreme Court's rules in accordance with certain standards. Therefore, in most cases, the prevailing party may receive an amount that is substantially less than the actual compensation amount paid to the attorneys.

## 5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

See **5.6 Compensation of Legal Representatives**.

## 5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

### Stay of Provisional Execution

The losing party at the first-instance court may file an appeal within two weeks of the date of receipt of the first-instance court's decision. If the first-instance court orders a defendant to pay damages, the defendant may apply to stay provisional execution of the first-instance court's decision. In such a case, the court usually accepts the stay application on the condition that cash corresponding to the judgment amount is deposited.

### Appellate Court

At the appellate court, parties may submit new evidence that was not submitted at the first-instance court, and may make new arguments regarding the facts and law. It usually takes around one year for the appellate court to announce its decision. If the appellate court finds it necessary, a reassessment process for the damages amount may also take place. Even if the appellate court decides that damages should be paid, it is possible to stay provisional execution using the same method as that used for the first-instance court's decision above.

### Supreme Court

The losing party at the appellate court may file an appeal to the Supreme Court within two weeks of the date of receipt of the appellate court's decision. At the Supreme Court, only law is reviewed, not facts. It is difficult to predict how long it will take for the Supreme Court to announce its decision.

### Number of Appeals

Although not limited to damages lawsuits for cartels, according to statistics announced by the court in 2022, the rate of appeal to the appellate court for civil cases in 2021 was around 42%, and the rate of appeal to the Supreme Court was around 25%.

## 6. Supplementary Information

### 6.1 Other Pertinent Information

The trend towards filing damages lawsuits is increasing in Korea. In this regard, the assessment of the damages amount and the statute of limitations are explained below.

#### Assessment of Damages Amount

In a damages lawsuit for violation of the MRFTA, when the issues have been organised to a certain degree, it is common for the plaintiff to apply for assessment of the damages amount. It is also possible for the defendant to apply for assessment of the damages amount. If the party requesting the assessment recommends appraiser candidates, the other party usually submits its opinion regarding whether the candidates are appropriate or inappropriate.

In order to avoid challenges about fairness, the court tries to select the candidate mutually agreed upon by the parties; if the parties cannot reach an agreement, the court appoints the candidate that it considers appropriate as appraiser. In such a case, a third party not discussed as an appraiser candidate may be designated as the appraiser. If the appraiser designated by the court submits an assessment report on the damages amount, both parties can point out problems in the assessment or request supplementation of the assessment through an application for fact enquiry or an application for supplementation of the assessment. Depending on the circumstances, the parties point out problems in the assessment report and impeach the reliability of the assessment report through their appointed experts.

#### Statute of Limitations

The statute of limitations for a tort runs out if the victim fails to bring the claim within three years of the date they became aware of the damages and the identity of the perpetrator, or within ten years of the date of the tort.

### 6.2 Guides Published by Governmental Authorities

An English translation of the Monopoly Regulation and Fair Trade Act and the Enforcement Decree of the Monopoly Regulation and Fair Trade Act is available online.

# Trends and Developments

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**Shin & Kim**

**Shin & Kim** has the largest team of antitrust specialists in Korea, with more than 70 dedicated experts, including a former Korea Fair Trade Commission (KFTC) chairman, officers and committee members, and former prosecutors and judges. The group is complemented by the largest number of KFTC alumni lawyers of any law firm, all of whom have extensive expertise in antitrust law and deep familiarity with KFTC enforcement practice. The firm has also gained a strong reputation for defending clients in KFTC investigations, including on-site investigations and hearings, and for representing clients in administrative appeals and relevant damages lawsuits. The group has represented numerous foreign clients in KFTC investigations and litigation.

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## Introduction

In Korea, the statutory basis for challenging cartel behaviour/effects is the Monopoly Regulation and Fair Trade Act (MRFTA). As the enforcement authority of the MRFTA, the Korea Fair Trade Commission (KFTC) may impose remedial orders and a surcharge on a company that has taken part in a cartel in violation of the MRFTA, and may file a referral to the prosecutors' office. If the KFTC imposes remedial orders and a surcharge on a cartel participant, the violator may file an administrative lawsuit against the KFTC for cancellation of the measures. The fully amended MRFTA, which came into effect on 30 December 2021, contains several modifications, including several revisions that specifically address cartels. Among them, the inclusion of information exchange as a type of cartel is the most important change related to cartels. Recent major KFTC and court decisions regarding cartels are as follows.

## The KFTC's Recent Regulation of Cartels

The KFTC, like other foreign competition authorities, actively regulates cartels. According to the KFTC's statistics, in 2022, the KFTC handled a total of 76 cartel cases. Of the 76 cases, bid-rigging cases were the highest in number with 54 cases, and there were 13 price-fixing cases. Meanwhile, the KFTC imposed a surcharge in 45 out of all cartel cases and filed a referral to the prosecutors' office in ten out of all cases. The major recent cartel cases of the KFTC follow.

### *Foreign car manufacturers' case*

In February 2023, the KFTC announced that it had decided to impose a total surcharge of approximately KRW42.3 billion (tentative) with remedial orders on foreign car manufacturers ("the four companies") for colluding to introduce software that reduces the amount of AdBlue dosing in their development of selective catalyst reduction (SCR). SCR is a system converting nitrogen oxides (NOx), which are poisonous gases mostly formed when fuels are combusted within a car engine, into harmless water and nitrogen by injecting AdBlue into exhaust gases. As the amount of NOx emitted depends on the amount of AdBlue injected, developing the AdBlue injection strategy is considered as a key technology of the SCR system.

According to the KFTC press release, the four companies reached a consensus on the need to decrease the amount of AdBlue consumption to maintain the distance a vehicle can travel without having to refill AdBlue to the same level. In June 2006, the four companies discussed AdBlue dosing strategies for the SCR software at a meeting, reaching a common understanding that it was unnecessary to always reduce NOx to the maximum extent. They colluded to adopt a specific strategy for reducing AdBlue consumption, and agreed on a set of technical conditions. The four companies produced diesel cars equipped with the SCR software that reflected their agreement.

The KFTC found that the agreement among the four companies was anti-competitive, as it imposed limitations on the types and standards of products. The KFTC explained that the agreement restricted the development and release of new diesel cars that might have had better NOx reduction performance. Collusion on the type and standard of products reduces the incentive for innovation and limits consumer choice.

The case is the first instance in which the KFTC has taken action against agreements between companies regarding research and development (R&D). The KFTC has determined that agreements related to R&D between companies to avoid competition in the development of inno-

vative environment-related technologies also fall under collusion prohibited by competition law. According to the KFTC press release, since this case involved specialised environmental technology, the KFTC closely co-operated with the Ministry of Environment in Korea, national research institutions, and foreign competition authorities to regulate illegal acts. Based on the KFTC's evaluation of this case, it is likely that the KFTC will actively regulate agreements between companies related to R&D that restrict market competition.

#### *Foreign pharmaceutical companies' case*

In October 2022, the KFTC announced that it had imposed remedial orders and a total surcharge of approximately KRW2.6 billion (tentative) on foreign pharmaceutical companies for colluding to suppress competition in the cancer drug market. According to the KFTC press release, under the alleged agreement, Company B promised not to produce and release generic drugs in return for receiving the exclusive rights to sell several cancer drugs ("Drug Products") from Company A.

The KFTC explained that the two pharmaceutical companies had engaged in collusion to avoid the competition of producing and releasing generic drugs and to share benefits. Company A saw Company B's launch of generic drugs as a business risk and tried to stop the release of these drugs. Company B thought that colluding with Company A to avoid competition in return for exclusive rights to sell Drug Products was more profitable than developing generic drugs.

The KFTC found that the collusion at issue was an anti-competitive agreement that restricted the market entry of a potential competitor. As the release of generic drugs by Company B was stopped, it reduced the possibility of a price reduction in drugs and undermined innovation on the pharmaceutical market by reducing incentives for R&D in generic drugs. The KFTC also found that the collusion could lead to an increase in the price of drugs and fewer choices of generic drugs, undermining consumer welfare.

#### *Major ice-cream manufacturers' case*

In February 2022, the KFTC imposed remedial orders and a surcharge of approximately KRW135 billion on major ice-cream manufacturers for various types of collusion related to ice cream. According to the KFTC decision, ice-cream manufacturers reached an agreement in February 2016 not to supply their ice cream to retail stores that already had business relationships with other manufacturers, due to the intensifying price competition in supplying ice cream to small and medium-sized retail stores. Due to certain characteristics of the Korean retail market for ice cream, whereby a single retail store generally procures ice cream from a single manufacturer, the collusion among ice cream manufacturers resulted in a lack of competition in supplying their products to retail stores that were already doing business with other manufacturers. The KFTC deemed this as an agreement that restricted transaction partners. Additionally, ice-cream manufacturers agreed on factors that affected the delivery price of ice cream supplied to convenience stores, hypermarkets, and other stores, and engaged in bid rigging for ice-cream supply bids hosted by a specific company. The KFTC concluded that over approximately four years, ice-cream manufacturers had engaged in various types of collusion, which ultimately affected the entire domestic ice-cream market.

### Recent Significant Court Decisions Related to Cartels

In South Korea, an administrative lawsuit against the KFTC falls under the exclusive jurisdiction of the Seoul High Court, as prescribed by the MRFTA. The Seoul High Court not only deals with appeals related to the violation of the MRFTA, but in the case of an administrative lawsuit against the KFTC, it actually functions as a first-instance court. Unlike ordinary litigation, which proceeds with a three-tiered court system that goes through the district court, high court and the Supreme Court, in the case of an administrative lawsuit against the KFTC, it actually goes through a two-tiered court system of the Seoul High Court and the Supreme Court. Major recent cartel cases that went to court include the following.

#### *Compound-feed manufacturers' case*

The Supreme Court reached an important decision regarding price fixing through information exchange in a cartel case. Under the amended MRFTA, information exchange constitutes a cartel if an agreement to exchange information between companies restricts competition in the relevant market. However, the provision of the Amendment that regards information exchange as a cartel does not apply to conduct terminated before the effective date of the Amendment (30 December 2021). Therefore, in this case, the previous MRFTA provision applies to information exchanges in connection with conduct that terminated before 30 December 2021. The Supreme Court decision still holds significance, however, as it outlines the criteria for evaluating whether such behaviour can be classified as cartel behaviour.

In this case, 11 compound-feed manufacturers colluded on 16 occasions from October 2006 to July 2010 regarding the average level of price increases or price falls of compound-feed products by type and the timing of such changes. The CEOs of the 11 companies had CEO-level meetings and discussed at the level of price increases or decreases. Based on the agreements made at the CEO-level meetings, the executive-level and working-level meetings, and other means of communication that took place, the 11 companies shared specific price information to execute the agreement and determined the level of price increases or decreases and the timing of such changes. As a result of the agreements, the 11 companies maintained their prices at the same or a similar level by increasing or decreasing prices within the agreed scope at or around the agreed time. The KFTC imposed remedial orders and surcharges on these companies for price collusion.

The main issue in this case was whether the KFTC could determine a finding of price fixing on information exchange. The KFTC determined that the manufacturers had participated in multiple meetings where they exchanged price information and, over an extended period, established a shared notion that they jointly decided on feed prices. The KFTC also recognised that there was external conformity. Based on these points, the KFTC concluded that there was price fixing through information exchange in this case. However, the Seoul High Court ruled in favour of the manufacturers in their administrative lawsuit against the KFTC. The court stated that it was difficult to recognise any explicit or implicit intention to jointly agree or modify feed prices through the information exchange under question, and that therefore the KFTC decision was illegal. The court acknowledged that the feed manufacturers had exchanged price-related information for a prolonged period of time, which could have influenced competition by impacting the manufacturers' individual decision-making processes.

However, it clarified that this exchange of information alone did not necessarily mean that the manufacturers had reached an agreement to directly determine or maintain prices.

On 26 May 2022, the Supreme Court, the highest court in Korea, upheld the Seoul High Court's decision not to acknowledge price collusion via information exchange in this case (Supreme Court 2017Du47229, rendered on May 26, 2022). The following reasons were cited.

*Subject, timing and method of information exchange*

Considering all the factors, it is difficult to view that there was a collusion on price increases. For one thing, other small companies and feed buyers' associations also participated in the executive and working-level meetings in question. Additionally, no meeting was attended by all 11 companies' CEOs, and there was no evidence that the discussions held at the meetings were relayed to business operators who did not attend. Finally, it was difficult to specifically identify the details discussed at any meeting.

*Purpose and intent of information exchange*

The information exchange could not be interpreted as an intention to implement price-related agreements. The feed manufacturers' employees exchanged information with the aim of developing business or sales strategies. As indicated throughout the KFTC investigation, each company independently determined the actual selling prices.

*Structure and characteristics of the relevant market*

It is difficult for companies to jointly agree on prices for each product item in the compound-feed market, which has a wide variety of product types. Moreover, because the National Agricultural Cooperative Federation holds a 31% market share and has a significant impact on feed prices, the cartel activity of the 11 manufacturers (whose combined market share was 43%) would not have had a substantial impact on the market on its own.

*Nature of the exchanged information*

The exchanged information could not be considered confidential business information as there were various ways for competitors to find out the approximate time of the price increase or average rate of the price increase.

*Whether there was external conformity*

It is difficult to see the existence of external conformity in this case, considering the significant differences between the collusion content alleged by the KFTC and the actual price fluctuations, and the possibility that similar price fluctuations were due to changes in raw material prices rather than collusion.

***Railway-related equipment case***

In the bid-rigging case, the Seoul High Court made an important ruling on how to determine the anti-competitive effect of bid rigging when a company that did not participate in the bid rigging joins the bidding (Seoul High Court 2021Nu37580, rendered on 17 February 2022), which was recently upheld by the Supreme Court. In this case, two companies that manufacture railway-related equipment reached an agreement in advance with the company that was to be awarded the contract on the bidding price. The plaintiff company in the administrative lawsuit against the KFTC contended in the KFTC phase that the bid rigging in the KFTC phase had no significant anti-competitive impact, or at least a very minimal one, because the three companies that did not participate were likely to bid and some of them did participate. However,

the KFTC did not accept these arguments and imposed a surcharge based on its own administrative surcharge percentage of 5%.

The Seoul High Court made two distinct determinations: first, whether there was an anti-competitive effect in this case, and second, to what degree the anti-competitive effect was present. Firstly, regarding whether competition was restricted due to bid rigging in this case, the court determined that bid rigging constitutes cartel conduct if it has the effect of restricting competition, even if it occurs only among some participating companies and not among all companies participating in the bidding. Based on the specific facts of the case, the court found that the two companies' agreement on the intended awardee and the bidding price had restricted competition in the bidding.

However, the Seoul High Court ruled that the degree of anti-competitive effect resulting from the bid rigging was not significant. Even though the KFTC had concluded that the three companies that did not participate in the bid rigging were not in a competitive relationship with the two companies that were involved in the bid rigging, the court disagreed with the KFTC's finding and determined that the actual degree of anti-competitive effect of the bid rigging was low. Meanwhile, the KFTC imposed an administrative surcharge at 5%, determined by its internal criteria. However, the Seoul High Court determined that the 5% rate was only appropriate in cases where the degree of competition restriction was high. In this particular case, the degree of competition restriction was low, which rendered the KFTC's decision to impose a surcharge at the 5% rate illegal.

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